California Building Industry Association

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Dear:_____

The California Building Industry Association ("CBIA") is a non-profit statewide organization representing approximately 3,200 member companies responsible for all aspects of the planning, design, construction, financing, insuring, sales and maintenance of approximately 70% of all new homes built in California each year. CBIA also negotiated portions of and ultimately supported the legislation that created the Delta Stewardship Council, the co-equal goals, and the requirement to produce the Delta Plan. CBIA respectfully submit these comments on the Delta Stewardship Council ("Council")'s Fourth Administrative Draft Delta Plan, dated June 13, 2011 ("Draft Plan").

As an initial matter, CBIA notes it is well-established that when an administrative agency such as the Council implements a statutory requirement, the agency cannot act in a manner that is "inconsistent with the governing statute, alter[s] or amend[s] the statute, or enlarge[s] its scope." *California School Boards Association v. State Board of Education* (2010) 191 Cal.App.4th 530, 544; *Yamaha Corporation v. State Board of Equalization* (1998) 19 Cal.4th 1. Where an agency regulation or other action reflects an inconsistency or conflict with the governing statute, it is void and "a court has a duty to strike [it] down." *California School Boards Association v. State Board of Education, supra*, at 544. Furthermore, where as here, the agency's interpretation of statutory terms is not the product of quasi-legislative rulemaking but instead reflects only the agency's non-expert opinion of what the statute means, its resulting actions will be given little if any deference by a reviewing court. *Id.* at 543-544.

In CBIA's view, the Draft Plan violates these settled administrative law precepts because it conflicts with the Sacramento-San Joaquin Delta Reform Act of 2009 ("Act") in two fundamental respects: (1) The Draft Plan ignores key statutory language limiting the scope of covered actions subject to the core requirements of consistency with the Delta Plan and appealability to the Council; and (2) the Draft Plan impermissibly attempts to expand the scope of the Council's regulatory reach beyond the clear limitations expressed in the Act. CBIA's specific concerns are as follows:

<u>The Draft Plan should acknowledge that all ministerial actions are not covered actions under Water Code section 85057.5(a)</u>. The Draft Plan determines, correctly, that ministerial projects will not have a significant impact on the achievement of one or both of the coequal goals or the implementation of certain government-sponsored flood control programs (p. 44). Notwithstanding this determination, The Draft Plan (pp. 44-45) asserts that as an initial matter, ministerial projects may be covered actions because the Act's definition of covered action references a definition of "project" found in the California Environmental Quality Act ("CEQA") (Public Resources Code ("PRC") section 21065), and that language read in isolation is not limited to discretionary agency actions. As a result, the Draft Plan limits the exclusion of ministerial actions from covered actions to situations where the "underlying" ordinance or statute that governs the ministerial action is itself determined to be consistent with the adopted Delta Plan (p.45).

This conclusion is flawed and unreasonable. First, the Act's reference to PRC section 21065 cannot be viewed in isolation. PRC section 21065 defines "project" for purposes of CEQA, but must be read in harmony with intertwined statutory provisions that have had the longstanding practical effect of excluding from the CEQA definition of project all ministerial actions. For example, PRC section 21080(b)(1) provides that "This *division* does not apply to any…ministerial projects proposed to be carried out or approved by public agencies." PRC section 21065 is a part of "*this division*." A reasonable reading of the Act's reference to the CEQA definition of "project" is that the Legislature intended the reference as one of limitation—limiting the potential universe of covered projects to discretionary actions consistent with longtime common understanding and usage in CEQA. Second, requiring the "underlying" ordinance or statute to be consistent as a condition for exempting a specific ministerial action is itself inconsistent with the Council's correct determination that ministerial actions "will not have a significant impact under Water Code section 85057.5(a)(4)." The consequence of this determination should be that no ministerial actions are covered actions. Moreover, a ministerial project is one in which the governmental agency has *no* discretion to deny or modify the project. A denial or modification is legally impossible. The law does not command the impossible. It would be a futile act to subject such a project to a consistency review.

Requested Change #1: Make a clear determination that no ministerial actions are covered actions.

<u>The Draft Plan improperly lowers a statutory threshold for defining covered action.</u> The Draft Plan correctly recognizes that to qualify as a covered action in the first instance, the action must meet each of the four conditions set forth in Water Code section 85057.5, subdivision(a). However, the Draft Plan (p.44) improperly interprets the language of paragraph (4). Paragraph (4) provides that an action may only be a covered action if it "will have a significant impact on the achievement of one or both of the coequal goals or the implementation of [specified flood control programs]." The clear focus of this language is on the magnitude of the impact on the achievement of the goals or flood control programs: will the action have a *significant impact on the achievement of* [the goals/programs].

The Draft Plan (p.44), however, focuses instead only on the nature of the change *to existing conditions*: "For this purpose, the Council has determined that 'significant impact" means "*a substantial change in existing conditions*…that will affect the achievement of [the goals/programs]." The problem with this approach is that it vitiates the clear statutory requirement that the action will have a *significant* impact on *achieving the specified goals/programs.* Thus, the Draft Plan would enable an action to be a covered action if there will be an "impact" to the goals/flood control. The requirement that the impact be significant is eliminated. While it is reasonable to assume that only actions that will effect a substantial change in existing conditions will have a significant impact on the achievement of the goals/programs, it is not also the case that such actions will necessarily (or even likely) have a significant impact on achieving the specified goals/programs. It is therefore unreasonable to adopt an interpretation of the statute that

dispenses with the requirement that an action—including an action that effects a substantial change in existing conditions—will have a significant impact on achieving the relevant goals/programs.

Requested Change #2: Define "significant impact" as follows: "A substantial change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project and that will have a significant impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce the risks to people, property, and state interests in the Delta."

The Draft Plan interferes with CEQA. The Act (Water Code section 85032(f)) declares that its provisions shall not affect CEQA. However, the provisions of the Draft Plan relating to consistency determinations purport to require that "All covered actions must be fully transparent by disclosing all potentially significant adverse environmental impacts and mitigations of those adverse impacts." (Policy G P1, p.47; also p.45). This language clearly encroaches on the CEQA process and could be read to require that all potentially adverse impacts identified in the CEQA process (whether significant or not) be fully mitigated (whether feasible to do so or not). While CEQA requires the disclosure of potentially significant adverse environmental impacts and feasible mitigation, that process is separate from the consistency determination. The purpose of the consistency determination is to determine whether a covered action is consistent with the adopted Delta Plan. Therefore, information disclosure and mitigation provisions related to covered actions should be limited to those reasonably necessary to determine consistency. The Act's covered action and consistency review process cannot be used as a mechanism for the Council to impose sweeping new project review requirements.

Requested Change #3: Strike the language in the first bullet in G P1 on p. 47 and replace with the following: "All covered actions must provide information relating to the action sufficient to allow for a factually supported and reasonable determination that the action is consistent with the Delta Plan."

The Draft Plan fails to acknowledge and give effect to the critically important language contained in Water Code section 85057.5 (c). The language, which was amended into the legislation just prior to final passage, represents a significant limitation on the universe of actions that may qualify as a "covered action" as defined in subdivision (a). Subdivision (c) provides that "*Nothing in the application of this section [including the definition of "covered action"] shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law*."

The intent and effect of this language is to prohibit the Act's covered action definition and related consistency requirement from applying to any action for which the applicant had obtained a vested right via statute or common law prior to the Act's effective date. Two important examples are a project for which a Development Agreement was executed, or for which a complete application for a vesting tentative map was filed, before the Act's effective date. These represent statutorily-created vested

rights to apply for and obtain all remaining approvals necessary to undertake the action without being subject to new regulation such as the Act's consistency requirement. Absent the language in subdivision (c), an otherwise covered action would be subject to the Act's consistency requirement (unless it fell within one of the Act's express exemptions) notwithstanding the presence of statutorily-created vested rights, because these rights do not "vest" against newly adopted state regulatory requirements. By including the language in (c) however, the Act declares that it is not a new regulatory requirement that will apply to, and therefore abrogate, existing vested rights.

Requested Change #4: The Draft Plan should expressly recognize the language in subdivision (c) and its broad legal effect.

The Draft Plan (G P1, second bullet, p.47) improperly purports to require all covered actions to "document use of best available science and information." This is a significant new substantive regulatory requirement not in the Act itself and far exceeds the Council's authority to administer consistency review.

Requested Change #5: Eliminate this language.

The Draft Plan improperly characterizes the nature of the advisory reviews conducted pursuant to Water Code section 85212. Appendix B of the Draft Plan (pp.10-12) recognizes that plans, programs, projects and activities within the secondary zone of the Delta that the applicable MPO determines are consistent with the Sustainable Communities Strategy ("SCS") component of a Regional Transportation Plan ("RTP"), or an Alternative Planning Strategy ("APS"), are not covered actions. Appendix B suggests, however, that they are subject to a "separate requirement and process for consistency review by the council of these types of local and regional planning documents."

This language is misleading and should be changed to reflect the fact that, except with respect to the adoption of a draft SCS or APS, the Council's actions pursuant to section 85212 are strictly limited to providing "input" and "advice" regarding consistency with the adopted Delta Protection Plan. Section 85212 should not be identified as creating a "separate requirement and process for consistency review." In Water Code section 85022, the Legislature expressed its clear intent to require only covered actions to be consistent with the Delta Plan: "It is the intent of the Legislature that state and local land use actions, identified as 'covered actions' pursuant to 85057.5 be consistent with the Delta Plan." The corollary is that all other state and local land use actions are not required to be consistent with the Delta Plan and are not subject to "consistency review" as that phrase is used in the Act. Finally, with respect to adoption of the RTP (of which the SCS is an element), it is by statute not a covered action and not required to be consistent with the Delta Plan. Section 85212 only requires the MPO to "consult" with the Council "relating to the council's advice" about the relationship between a draft SCS or APS and the Delta Plan. This section does not establish a separate consistency requirement for the RTP, the SCS or an APS. It simply provides that the MPO must

provide a "detailed response" to the Council if the Council makes a "claimed inconsistency" with respect to the draft SCS or APS and the Delta Plan.

Requested Change #6: Use the phrase "consultation and advice" to describe the Council's actions pursuant to Section 85212 rather than "requirement and process for consistency review."

The Act contains seven statutory exemptions from covered actions in Water Code section 85057.5, but the Draft Plan identifies and discusses only a select few (p. 44). This omission precludes a complete understanding of the Act's covered action provisions.

Requested Change #7: The Draft Plan should identify each of the Act's statutory exemptions from the definition of covered action (Water Code section 85057.5(b)(1)-(7)) and make clear that each exemption forms an independent basis for exclusion from the definition of covered action and therefore from the requirement of consistency review with the Delta Plan.

Ecosystem Restoration Policy 3 (p. 91) exceeds the Council's regulatory authority under the Act. This policy purports to restrict any new or amended local or regional land use plan by conditioning its approval on minimizing adverse impacts to the opportunity for habitat restoration at the elevations shown in Figure 5-3, and on floodplains in the Delta or Delta watershed. This regulatory provision exceeds the scope of review and permissible limitations that the Act places on covered activities through the consistency review process. Under the guise of preserving potential areas for habitat restoration, the Council cannot effectively expand the scope and nature of the Act's land use regulation.

Requested Change #8: Delete ER P3

The policy contained in Table 7-1 exceeds the Council's regulatory authority under the Act. Table 7-1 indicates that a residential development in a non-urbanized area that has a FEMA 100-year certification is "not acceptable". This is contrary to the requirements of SB 5, which only requires meeting a standard higher (the urban level of flood protection) than the FEMA 100-year standard for projects in urban and urbanizing areas. See Government Code sections 65865.5, 65962, 66474.5 and 66007(k).

Requested Change #9: Delete this provision

Respectfully,

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